THONG GUAN CONSTRUCTION SDN BHD

v.

SHENCOURT PROPERTIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[CIVIL SUIT NO: S7-22-321-2000]
1 DECEMBER 2000

CIVIL PROCEDURE: *Appeal - Competency of appeal - Appeal from SAR's decision allowing application for amendment to summons-in-chambers - Whether decision an interlocutory order and therefore not a "decision" under s. 3 Courts of Judicature Act 1964 to be appealed from - Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd - Whether register's decision specifically made appealable by O. 56 r. 1(1) Rules of the High Court 1980 - Whether that prevails over definition of "decision" under s. 3 Courts of Judicature Act 1964*

This was an appeal from the decision of the senior assistant registrar ('SAR') to the judge in chambers under O. 56 r. 1(1) of the Rules of the High Court 1980 ('RHC'). A preliminary objection was raised, *ie*, that the appeal was incompetent as it was from an interlocutory order of the SAR and not a final order. As such, the decision was not appealable as it was not a "decision" under s. 3 of the Courts of Judicature Act 1964 ('the Act'). The case of *Kee Yee Maritime Co Ltd v. Coastal Shipping Sdn Bhd* was cited in support.

Held:

[1] Order 56 r. 1(1) RHC expressly provides that an appeal shall lie to a judge in chambers from any judgment, order or decision of the registrar. Therefore, the SAR's decision is specifically made appealable.

[2] The court did not agree with the learned judge in *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd*. The learned judge therein did not consider O. 49 r. 6(1) of the Subordinate Courts Rules 1980 ('SCR') which clearly provides that an appeal shall lie to a judge in chambers of the High Court from an interlocutory order of the sessions court.

[3] As O. 49 r. 6(1) SCR and O. 56 r. 1(1) RHC are special provisions, they must prevail over the definition of "decision" under s. 3 of the Act.

[Appeal allowed.]

Case(s) referred to:

Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd [2001] 5 CLJ 194 ***(not foll)***

Seloga Jaya Sdn. Bhd. v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 2, 3
Courts of Judicature (Amendment) Act 1998, s. 2
Rules of the High Court 1980, O. 20 r. 8, O. 56 r. 1(1)
Subordinate Courts Rules 1980, O. 49 r. 6(1)

For the plaintiff - Ng Chek; M/s Ng Chek & Co
For the defendant - Johnston Yap; M/s Yap & Company

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

Introduction

This is an appeal to the judge in chambers against the decision of the senior assistant registrar ('SAR') of the High Court on 24 August 2000 wherein she allowed the plaintiff's application at encl. 8 to add the words "Penghakiman Terus di bawah Aturan 81 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk" to the relief (1) of the plaintiff's summons in chambers at encl. 5. The application for the amendment was made pursuant to O. 20 r. 8 of the Rules of High Court 1980 ('the RHC').

Preliminary Objection

Before hearing the merit of the appeal, Encik Ng Chek, learned counsel for the plaintiff, raised a preliminary objection contending that the decision of the learned SAR was not appealable on the ground that the decision was an interlocutory order and not a final one and as such, the defendant was incompetent to file the appeal to the judge in chambers and urged this court to dismiss the appeal with costs, and he cited the definition of "decision" under s. 3 of the Courts of Judicature Act 1964 ('the Act') and the case of *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd* [2001] 5 CLJ 194 HC in support.

Encik Johnston Yap, learned counsel for the defendant, on the other hand, argued that the appeal was in order as it was brought to the judge in chambers under O. 56 r. 1(1) of the RHC. In support of his argument he cited *Seloga*

Jaya Sdn. Bhd. v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716; [1994] 2 AMR 1232 SC; and *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241; [1996] 1 AMR 215 FC.

After hearing them, I, on 21 November 2000, dismissed the preliminary objection with costs.

I now give my reasons for so doing.

The Findings

In considering this appeal, it may be useful to first reproduce the relevant statutory provisions and the principles in the cited cases.

O. 56 r. (1) of the RHC provides:

> An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

The word "decision" under s. 3 of the Act states:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

The above definition of "decision" came into force on 1 August 1998 *vide* s. 2 of the Courts of Judicature (Amendment) Act 1998 (Act A 1031).

In *Tuan Haji Ahmed Abdul Rahman*, *supra*, the Federal Court held:

> 1.(a) In appeals to a judge in chambers from the decision of the High Court, the judge does not exercise appellate jurisdiction in the same sense as when he hears appeals from judgments or orders of the subordinate courts.
>
> (b) The appeals from decisions of the registrar are by way of an actual re-hearing and the matter is treated by the judge as though it comes before him for the first time. The judge is therefore not confined to the points taken before the Registrar.

Whereas in *Seloga Jaya Sdn. Bhd*, *supra*, the Supreme Court held:

> 1(a) A judge in chambers who hears an appeal from discretionary order of the Registrar, exercises his own discretion as if the matter comes before him for the first time, unfettered by the previous exercise of the Registrar's discretion. The Judge will give the Registrar's decision whatever weight it deserves.

The above two cases clearly established that an appeal from the decision of the registrar is not actually an appeal but a re-hearing. In the re-hearing, the judge does not exercise his appellate jurisdiction but rehears the matter afresh as though the matter comes before him for the first time. The judge is free to decide according to the merit of the case unfettered by the decision of the registrar, though the judge may give the registrar's decision whatever weight it deserves.

It is to be noted that the registrar's decision is the decision of the High Court. Hence, an appeal to a judge in chambers from the registrar's decision is not to be treated as an appeal from any judgment, order, or decision of the subordinate court after trial.

Order 56 r. 1(1) of the RHC expressly provides that an appeal shall lie to a judge in chambers against any judgment, order or decision of the registrar. Registrar here includes senior assistant registrar ('SAR') (see s. 2 of the Act).

Therefore, since the SAR's decision is specifically made appealable, it is my judgment that the new definition of "decision" under s. 3 of the Act does not apply to the SAR's decision for the purpose of O. 56 r. 1(1) of the RHC.

In *Kee Yeh Maritime, supra*, it was held that the appeal against the ruling of the Sessions Court Judge (SCJ) dismissing the appellant's application to strike out the defence and granting the respondent leave to defend, was incompetent on the ground that the SCJ's order was only an interlocutory order and hence not a decision as defined by s. 3 of the Act.

With great respect, I am unable to agree with the learned judge, simply because O. 49 r. 6(1) of the Subordinate Courts Rules 1980 (the SCR) obviously provides for an appeal to a judge in chambers of the High Court against an interlocutory order of the sessions court.

Order 49 r. 6(1) of the SCR states:

> Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

However, the above provision has since been amended *vide* P.U.(A)343/2000, which came into effect from 22 September 2000, and it states very clearly:

> Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after trial by the Court shall lie to a Judge in Chambers of the High Court.

Unfortunately, in that case, the learned judge did not appear to have considered that provision which, I think, is clearly applicable to the appellant's appeal as the appeal was against the interlocutory order of the sessions court, *ie*, dismissing the appellant's application to strike out the respondent's defence without trial. In the present case, the appeal before the High Court was from the decision of the SAR of the High Court by virtue of O. 56 r. 1(1) of the RHC which specifically provides for an appeal to a judge in chambers from any judgment, order or decision of the registrar. Since both O. 49 r. 6(1) of the SCR and O. 56 r. 1(1) of the RHC are special provisions, I feel their provisions must prevail over the "decision" as defined under s. 3 of the Act, and as such, the definition has no application to the "decision" under those two orders.

This being the case, I made the order accordingly and ordered the appeal to be heard forthwith.